IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.247 OF 2003

Atul Ratikant Shah ... Petitioner

v/s

Shekhar K. Shah ... Respondent

Mr Sandip Parikh with Mr Gautam Panchal i/b M/s Bilawala and Co. for Petitioner.

Mr Milind Vasudeo i/b M/s Khaitan and Jaykar for Respondent.

CORAM : D.K.DESHMUKH J.

DATE : 15TH FEBRUARY 2005

P.C.: -

1. This is a petition filed under section 9 of the Arbitration and Conciliation Act 1996 for certain interim reliefs. The facts that are necessary and relevant are that admittedly by agreement dated 11th April 1997, the parties agreed to refer their disputes to Sole Arbitrator by name Mr Milind S. Kothari. Thereafter, the disputes were referred to the named Arbitrator, he made an award dated 30th November 1998. That award was challenged in arbitration petition No.124 of 1999. By order dated 7th November 2001, the Court set aside the award. The operative part of the order reads as follows :-

> "As award is set aside, it is open to the parties to invoke the arbitral clause before this Court under section 11 if by consent they do not agree to appointment of Arbitrator."

. According to the petitioner, Mr Kothari, the named Arbitrator cannot continue as Arbitrator because of his conduct during the arbitral proceedings, which is referred to in the order by this Court dated 7th November 2001. They moved an application under section 11 for appointment of Arbitrator. In that application,

an order was made appointing Arbitrator, that order is challenged by the respondent before the Division Bench in a writ petition. That writ petition has been admitted for final hearing and the proceedings before the Arbitrator have been stayed. Thus, presently, there is no appointment of Arbitrator in force. There is a named Arbitrator, but the petitioner is not willing to go before him and the Arbitrator who has been appointed under section 11 cannot function because of the interim order passed in the writ petition by this Court. For considering the present petition, the question that is required to be considered by this Court is whether the petitioner has done everything within his power for commencement of the arbitral proceedings. It is pertinent to note that the petitioner is unwilling to go before the named Arbitrator for the aforesaid reasons. Therefore, according to the petitioner, it appears that the mandate of the Arbitrator has been terminated. If that is so, it was for the petitioner to approach the Court for termination of the mandate of the Arbitrator. In case the Court holds that the mandate of the Arbitrator is terminated, the question of appointment of any person as Arbitrator would arise. In my opinion, provisions of sections 14 and 15 of the Arbitration and Conciliation Act 1996 are relevant. They read as under :-

"14. Failure or impossibility to act :

(1) The mandate of an arbitrator shall terminate if -

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12."

15. Termination of mandate and substitution of arbitrator :

(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate -

(a) where he withdraws from office for any reason, or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an

order or ruling of the arbitral tribunal made prior to replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal. "

. In these circumstances, therefore, it is clear that if according to the petitioner, mandate of Mr Kothari to act as Arbitrator is terminated because of his conduct, it was for the petitioner to file petition under section 14 of the Act for termination of the mandate of Mr Kothari as Arbitrator. The learned counsel appearing for petitioner is not in a position to give any reason as to why the petitioner has not taken that step. Really speaking, without there being an order terminating the mandate of the named Arbitrator, it is only the named Arbitrator who can function. If that is so, it is open to the petitioner to approach that Arbitrator for interim order under section 17 of the Act and therefore petition under section 9 of the Act cannot be entertained. Ad-interim order stands vacated. Taking overall view of the matter therefore, in my opinion, the petition is not entitled to any relief in the present petition. Petition is disposed off.

. Parties to act on the copy of this order duly

authenticated by the Associate / Personal Secretary as

true copy.

. Certified copy expedited.